NO. 76-678

In The Supreme Court of the United States

OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DARTT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

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Shell Oil Company, Petitioner, respectfully petitions for rehearing of the decision by this Court, issued on November 29, 1977, in which the judgment by the Tenth Circuit Court of Appeals was affirmed by an equally-divided Court.

Statement Of The Case

A full statement of the case is set forth in the Petition for Certiorari and in the principal Brief of Petitioner. Briefly summarized below are the principal facts and the primary holdings of the lower courts.

A. Summary of the Facts

Respondent, Mrs. Dartt, was discharged by Shell Oil Company on July 31, 1973. Mrs. Dartt believed that her discharge constituted unlawful discrimination against her because of her age, and she promptly contacted an attorney regarding her claim. The attorney, in turn, sent Mrs. Dartt to the U. S. Department of Labor, telling Mrs. Dartt that she did not need an attorney "at that time."

Mrs. Dartt then contacted the Department of Labor, which proceeded to advise Shell Oil Company of the claim on August 10, 1977, and to initiate an investigation. Mrs. Dartt thereafter periodically checked on the status of her case, but made no inquiry as to what her rights were under the A.D.E.A. or what she needed to do to preserve her A.D.E.A. rights. Through an oversight, the Department of Labor failed to advise Mrs. Dartt of the Notice of Intent to Sue requirement for private A.D.E.A. actions until after the 180-day period for giving such a Notice had expired. The first attorney also failed to inform Mrs. Dartt of the Notice requirement.

Mrs. Dartt learned of the Notice requirement on or about March 5, 1974. She contacted her present attorney,

who filed a Notice of Intent to Sue on or about March 14, 1974. This Notice was, therefore, filed some 36 days after the Notice period had expired. After waiting the required sixty days after giving her Notice, Mrs. Dartt instituted the instant action against Shell.

B. Principal Holdings Below

The District Court dismissed the action by Mrs. Dartt, holding that timely compliance with the Notice of Intent to Sue requirement was a jurisdictional prerequisite which could neither be fulfilled by an oral complaint, nor be excused upon any grounds less compelling than those which would toll a statute of limitations in a parallel situation. The District Court held that no tolling was permissible here, because: (1) Mrs. Dartt did not make a reasonable inquiry as to the existence of the requirement; (2) Mrs. Dartt was engaged in pursuit of a permissive administrative remedy; (3) Mrs. Dartt's oral complaint to the Labor Department did not satisfy the Congressional purposes for the Notice; and (4) it would be "just" to leave Mrs. Dartt to her administrative A.D.E.A. remedies under these circumstances.

A panel of the Tenth Circuit Court of Appeals agreed that the Notice requirement was a "jurisdictional prerequisite," which could not be fulfilled by an oral complaint, and further agreed that the time for compliance with that requirement could be tolled only upon traditional equitable principles applicable to statutes of limitations.

However, the panel concluded, contrary to the District Court, that tolling should properly be applied here, because: (1) the "de facto" purposes of the Notice were fulfilled when Shell and the Labor Department were advised of Mrs. Dartt's claim and were afforded the opportunity to resolve it; (2) there was no prejudice to Shell by lack of timely notice of intended suit; (3) Mrs. Dartt made prompt, good-faith efforts to properly pursue her claim; and (4) the remedial character of the statute warranted relaxation of procedural requirements of the A.D.E.A. under these circumstances.

The Court of Appeals, therefore, held that the 180-day Notice requirement was tolled until Mrs. Dartt actually filed her Notice of Intent to Sue. No explanation was given as to what actions by Mrs. Dartt or Shell caused the tolling to commence, nor was there any explanation as to why such tolling did not cease once Mrs. Dartt should have learned of, or actually learned of, the Notice requirement.

Questions Presented By The Writ Of Certiorari

This Court granted a writ of certiorari to review the following principal questions:

1. Whether timely compliance with the notice-of-intent-to-sue requirement of 29 U.S.C. § 626(d) is a substantive jurisdictional prerequisite to suit.

2. Whether fundamental legal principles bar the tolling of Section 626(d) for either a longer duration or for less compelling reasons than would justify the tolling of an ordinary statute of limitations.

Summary of Reasons For Granting Rehearing

1) It is of vital importance to the administration of the A.D.E.A. that this Court establish definitive guidelines as to the interpretation and application of Section 626(d). The decision below, treating an oral complaint to the Labor Department as fulfilling the *"de facto"* purposes of Section 626(d), is in direct conflict with the decision of the Fifth Circuit in *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974); the Sixth Circuit, in *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1976); and the clear language of the statute. Moreover, the decision below, allowing indefinite tolling of the Section 626(d) time period, is in direct conflict with numerous decisions by this Court holding that limitation periods are only tolled during the time a plaintiff is prevented from taking the necessary actions to bring suit, and that no tolling is allowable during pursuit of permissive administrative remedies. *Unexcelled Chemical Corp. v. U.S.*, 345 U.S. 59 (1953); *Soriano v. U.S.*, 352 U.S. 270 (1957); *Wood*

v. Carpenter, 101 U.S. 135 (1897); *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965). Such also is in direct conflict with holdings by the Fifth Circuit that no tolling of Section 626(d) can be allowed during pursuit of permissive A.D.E.A. administrative remedies, nor can any tolling be permitted on other grounds beyond the date that the plaintiff could have removed any impediment to compliance with Section 626(d) by making a reasonable inquiry as to his or her rights. *Edwards v. Kaiser Aluminum & Chemical Sales Corp.*, 515 F.2d 1195 (5th Cir. 1975); *Charlier v. S. C. Johnson & Son, Inc.*, ___ F.2d ___, 15 FEP Cases 421 (5th Cir. 1977).

2) Failure to establish definitive guidelines will frustrate the orderly judicial administration of the A.D.E.A., by focusing scarce judicial resources upon continued litigation as to the interpretation and application of Section 626(d). Moreover, failure to establish such guidelines will frustrate the settlement of A.D.E.A. disputes, due to lack of knowledge by complainants, respondents and the Department of Labor as to the circumstances in which a private party may bring suit. Finally, the sharp conflict between the Courts of Appeals will subject similarly-situated complainants and respondents to wholly different obligations and responsibilities, thereby undercutting the federal policies of uniformity embodied in the A.D.E.A.

3) This is the proper case in which to establish the necessary guidelines because the Section 626(d) questions are clearly presented by the record and by the decisions below. There are no other cases raising these questions which could reach this Court in time for resolution during the present term, to the best of the knowledge of counsel. However, the resolution of these questions is of continued importance, because these questions remain unsettled and continue to generate extensive litigation in the lower courts. Furthermore, the possibility of future legislation altering the Section 626(d) requirements does not negate the importance of these questions, both because the currently proposed amendments are prospective in application and because there is substantial doubt that such will be enacted into law.

4) Because of the clear split among this Court as to proper resolution of these questions, rehearing by the full Court is warranted. In addition, because of this split, this Court may consider it advisable to request the presentation of the views of the United States on these questions, both by way of briefs and argument.

Argument

I.
Resolution Of The Questions Raised By The Decision Below Is Of Vital Importance To Judicial Administration

This Court has long held that the time for compliance with a "jurisdictional prerequisite" is an integral part of the statutory enforcement scheme and must be strictly enforced. *Kavanaugh v. Noble*, 332 U.S. 539 (1947); *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441 (1976). The Court of Appeals held that Section 626(d) was a "jurisdictional prerequisite" to suit under the A.D.E.A., but found that it could extend the time for compliance with Section 626(d) under traditional statute of limitations tolling principles. Thus, that decision is in sharp conflict with both the decisions of this Court, and with decisions by the Fifth and Sixth Circuits. See *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975); *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976).

This Court has likewise long held that, even in dealing with ordinary statutes of limitations, tolling should be sparingly applied. See, e.g., *Amy v. Watertown*, 130 U.S. 320 (1889). Thus, tolling has been traditionally limited to situations where the defendant prevented the plaintiff from asserting rights (by fraud, or otherwise); where the plaintiff

was under some legal disability; or where the plaintiff was prevented from asserting rights by operation of law.[1] Moreover, even in the most egregious circumstances, such as fraud, the statute of limitations is not tolled indefinitely, and any tolling is limited to the period of time during which the plaintiff was reasonably unaware of the fraud. *Hardt v. Heidweyer*, 152 U.S. 547 (1894); *Wood v. Carpenter*, 101 U.S. 135 (1879).

Because tolling is allowed only where plaintiffs are prevented from asserting their rights through no fault of their own, this Court has consistently refused to allow tolling where the plaintiff mistakes the proper procedures to preserve his or her rights. Where a plaintiff mistakes the proper remedy, or avails herself of a permissive remedy, it is well-settled that no tolling is allowable, even though the defendant is aware of the claim and might arguably suffer no prejudice by tolling. *Willard v. Wood*, 164 U.S. 502 (1896); *Unexcelled Chemical Corp. v. U.S.*, 345 U.S. 59 (1953), *Soriano v. U.S.*, 352 U.S. 270 (1957); *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441 (1976).

There is only one limited exception to the refusal to allow tolling where a plaintiff erroneously fails to correctly pursue a certain remedy within the limitation period, which exception was created by *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965). In *Burnett* tolling, there

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[1] 1 J. Story, *Equity Jurisprudence*, 136 (11th Ed. 1873).

must have been full compliance with statutory procedures designed to notify the defendant of the suit against it; there must be compelling statutory purposes which would be effectuated by tolling; and, the defect in the initial proceeding must not be jurisdictional. Furthermore, *Burnett* tolling occurs only during the time that the initial action acts as a bar to the institution of a duplicative action in a different forum. (380 U.S. at 429). Thus, once the initial action is dismissed on non-jurisdictional grounds, the statute of limitations begins to run again.

The primary grounds upon which the Court of Appeals relied in applying a *Burnett*-type tolling to the case at bar were that the oral complaint by Mrs. Dartt substantially fulfilled the purposes of Section 626(d) and that the allowance of tolling would further the remedial purposes of the A.D.E.A. Such conclusion is in direct conflict with decisions by the Fifth and Sixth Circuits, holding that no such tolling is permissible because an oral complaint to the Labor Department does not fulfill the statutory jurisdictional requirement that a defendant be informed of intended suit against it. *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974); *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976); *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1976).

Thus, there is a serious conflict as to whether a *Burnett*-type tolling is applicable to an oral complaint, both because the giving of a Notice of Intent to Sue is a jurisdictional requirement and because an oral complaint

does not give a defendant the statutorily-required notice of such intended suit. This Court was not presented with such questions in *Burnett*, because the defect therein was non-jurisdictional and the plaintiff therein fully complied with all jurisdictional requirements designed to give the defendant notice of his suit against it. Therefore, application of *Burnett* to these circumstances would require an affirmative decision to greatly expand the tolling principles laid down in that case.

Moreover, assuming *arguendo* that *Burnett*-type tolling should be extended to situations, such as here, where there is a jurisdictional defect in the initial notice given to the defendant, this Court must address itself to what actions trigger and stop such tolling. In *Burnett*, the tolling commenced when the plaintiff filed his initial action and continued only during the time that the plaintiff was "prevented from asserting" his F.E.L.A. claim in another forum due to the pendency of his first action (380 U.S. at 429). If such a rationale is applied to the Dartt complaint, the tolling would commence when she registered that complaint and would continue while she was "prevented from asserting" her private A.D.E.A. rights. Therein lies the crux of the problem.

Mrs. Dartt was pursuing a permissive administrative remedy, and was not "prevented from asserting" her private A.D.E.A. rights during the pendency of her oral complaint with the Labor Department. *Unexcelled Chemical Corp. v. U.S.*, 345 U.S. 59 (1953). Instead, the failure

of Mrs. Dartt to assert those rights was due to her simple ignorance of the law. Assuming *arguendo* that Mrs. Dartt can be said to have been "prevented from asserting" her private right of action due to her failure to inquire about her A.D.E.A. rights and the concomitant failure of the Labor Department to volunteer such information, no tolling should be allowed beyond the time when she reasonably should have learned of Section 626(d). It would be anomalous to excuse Mrs. Dartt from making a reasonable inquiry as to her rights while placing such a burden on victims of fraud. *Hardt v. Heidweyer*, 152 U.S. 547 (1894); *Stearns v. Page*, 7 How. 819, 48 U.S. 418 (1848); *Wood v. Carpenter*, 101 U.S. 135 (1879). See also, *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975); *Charlier v. S. C. Johnson & Son, Inc.*, ___ F.2d ___, 15 FEP Cases 421 (5th Cir. 1977); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975).

The decision below, therefore, presents serious conflicts with the prior decisions of this and other courts both by allowing any tolling whatsoever of the Section 626(d) jurisdictional requirement during pursuit of a permissive administrative remedy and by extending such tolling even beyond the date when Mrs. Dartt acquired actual knowledge of Section 626(d). By allowing such indefinite tolling, the Court of Appeals appears to have adopted a principle of *laches* in determining whether Mrs. Dartt's Notice of Intent to Sue was timely. However,

in *Burnett*, this Court expressly rejected the application of the doctrine of *laches* where, as here, there are federal policies of certainty and uniformity embodied in the limitation period. (380 U.S. at 435). Finally, assuming *arguendo* that the doctrine of *laches* should apply, the queston of *laches* is "primarily addressed to the discretion of the trial court." *Gardner v. Panama R. Co.*, 342 U.S. 29, at 30. The District Court here found, in essence, that Mrs. Dartt was guilty of *laches* in failing to make any inquiry as to her private right of action under the A.D.E.A. The Court of Appeals excused this failure to make an inquiry because of Mrs. Dartt's ignorance of the law and the remedial character of the A.D.E.A.

Ignorance of the law has traditionally been held to be no excuse.[2] Furthermore, all statutes are presumably enacted in furtherance of the public health, welfare, safety or morals and can properly be described as "remedial." Thus, there would appear to be no justification for excusing ignorance of the law for certain "civil rights" plaintiffs, while not excusing it for other plaintiffs, such as those who seek relief for a taking of their property without just compensation. *Soriano v. U.S.*, 352 U.S. 270 (1957). Because there is no means by which the lower courts can differentiate between the various degrees of "remedial" relief afforded by a particular statute, and be-

[2] *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, at 283 (1925). See also, 1 J. Story, *Equity Jurisprudence* 108, 109 (11th Ed. 1873).

cause most laymen are ignorant of their rights until they inquire about them, the decision by the Court of Appeals is predicated upon improper grounds. As a result, this Court must grant rehearing in order to correct these errors by the Court of Appeals.

The extension of *Burnett* to situations such as those present here would create substantial problems of judicial administration and would seriously infringe upon Congressional prerogatives. It is not at all unusual for Congress to enact statutes which allow a person to both complain to an administrative agency and to sue on his own behalf.[3] Prior resort to such permissive administrative remedies has never been held to toll a time limitation upon the institution of suit, even though the plaintiff may be ignorant of the proper procedures to preserve his judicial rights and even though the federal agency may not have volunteered such information. There are inherent problems with any departure from the common-law presumption of knowledge of the law, due to the judicial time involved in making such inquiries and the difficulty in ascertaining the truthfulness of claims of ignorance. Absent clear evidence that Congress intended to reject such settled maxims, this Court should refuse to engraft such an exception onto

[3]See, e.g., the provisions of the "wage and hour" laws (i.e., Equal Pay Act, Fair Labor Standards Act, Portal-to-Portal Act), which are enforced under 29 U.S.C. § 216, and the secondary boycott provisions of the National Labor Relations Act (29 U.S.C. §§ 158 (b)(4), 187). See also, *McMahon v. U.S.*, 342 U.S. 25 (1952); *I.L.A. v. Juneau Spruce Corp.*, 342 U.S. 237 (1952); *Unexcelled Chemical Corp. v. U.S., supra; Soriano v. U.S., supra.*

a limitation period. Because no such Congressional intent appears in the legislative history of Section 626(d), this Court must reverse the Court of Appeals decision and dismiss the instant action.

II.
The Necessary Guidlines On Section 626(d) Should Be Established In This Case

As was noted in the prior briefs of Shell, there have been some forty or more reported cases dealing with the interpretation of Section 626(d), including ten cases in the Courts of Appeals. According to the Labor Department, almost one-third of all reported A.D.E.A. cases involve questions concerning compliance with Section 626(d).[4] The resolution of the issues regarding the interpretation of Section 626(d) is clearly necessary, so that the lower courts may have the necessary guidance as to how to apply that Section.

The affirmance of the decision by the Court of Appeals by an equally-divided vote will serve to further complicate the role of the lower courts. Presumably, those members of the Court who voted for affirmance may well have questioned much of the reasoning by the lower court, but agreed with the result. Likewise, those members of the Court voting for reversal may have done so on either broad or narrow grounds. However, the effect of allowing the decision below to stand will be to cause additional

[4]Brief by the United States on Petition for Certiorari, p. 12, 13.

appeals to be filed, and additional actions to be brought, in an attempt to fit within the rationale of the decision below.

The practical effect will be that the lower courts will be forced to conduct broad evidentiary hearings on the knowledge by the plaintiff of Section 626(d), and of his or her actions to obtain knowledge, in order to insulate against reversal.[5] This will consume countless hours of judicial time, and the resources of both the plaintiff and the defendant. Much of this time and expense may well prove unnecessary, especially if the rationale of the decision below is rejected, in whole or in part, in a later decision by this Court.

This uncertainty as to the law will also adversely affect the Department of Labor. For instance, in *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975), the Department of Labor did not attempt to conciliate after receiving the Section 626(d) Notice, feeling that it was clearly untimely. However, under the rationale of the decision below, which subjects the Section 626(d) time limit to tolling and estoppel, the Department of Labor will have no way of knowing whether a Notice is timely or not. In order to avoid prejudice to both plaintiffs and defendants, the Department will be

[5]See, e.g., precisely such a reversal by the Fifth Circuit in *Charlier v. S. C. Johnson & Son, Inc., supra*, wherein the Fifth Circuit refused to consider the question of tolling until further hearings were held on the employees' knowledge of the A.D.E.A.

forced to allocate its scarce resources to expedited conciliations which it would otherwise forego.

The uncertainty will also undoubtedly affect the success of conciliations. Many employers, faced with apparently untimely Notices, will choose to litigate the question of timeliness, due to the current uncertainty of the law. Because of the sharp conflict on the question of tolling, the outcome of this litigation will be dependent upon the judicial circuit where the litigation takes place. Apart from the inherent unfairness in subjecting similarly-situated plaintiffs and defendants to wholly different rules of law, the failure to resolve these issues will undoubtedly encourage forum-shopping.

It is, therefore, clear that the failure to establish the necessary guidelines on the interpretation and application of Section 626(d) will interfere with the administration of the A.D.E.A. These problems will continue, even if the currently-proposed amendments to Section 626(d) are enacted into law.[6] These proposed amendments are applicable only to future civil actions, and do not affect any pending A.D.E.A. litigation. Furthermore, the House and Senate conferees are currently at impasse over various provisions of the proposed A.D.E.A. amendments, and there is a real possibility that no bill will be forthcoming.[7]

[6]See 123 Cong. Rec. S 17272-17304 (1977). The full text of these proposed amendments is set forth in Appendix E to the Reply Brief of Petitioner.

[7]See 1977 BNA Daily Labor Report No. 207 (A-1, A-8).

This case is the proper one for establishment of the necessary guidelines, for a number of reasons. The issue of whether the 180-day period of Section 626(d) is subject to statute of limitations tolling principles is common to all Section 626(d) litigation. The subsidiary issue as to whether tolling is allowable by virtue of an oral complaint to the Labor Department has also arisen in many of these cases.[8] Both of these issues are clearly presented to this Court in the instant case, both by the record and the decisions below.

In addition, there are no cases presently pending before this Court on petitions for certiorari involving these issues, although there are several undecided cases raising such issues in the Courts of Appeals.[9] Thus, it is

[8]*Berry v. Crocker Nat'l Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976); *Bishop v. Jelleff Associates, Inc.*, 398 F. Supp. 579 (D.C. D.C. 1974); *Davis v. RJR Foods*, 420 F. Supp. 930 (S.D. N.Y. 1976), *aff'd.* 556 F.2d 555 (2d Cir. 1977); *Goodman v. Heublein, Inc.*, ___ F. Supp. ___, 13 FEP Cases 26 (D.C. Conn. 1976); *Grossfield v. W. B. Saunders Co.*, ___ F. Supp. ___, 1 FEP Cases 624 (S.D. N.Y. 1968); *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976); *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975); *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976); *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974); *Woodford v. Kinney Shoe Corp.*, 360 F. Supp. 911 (N.D. Ga. 1973); *Smith v. Schlitz Brewing Co.*, 419 F. Supp. 770 (D.C. N.J. 1976); *Sutherland v. SKF Industries, Inc.*, 419 F. Supp. 610 (E.D. Pa. 1976).

[9]*Black v. Hunter Packing Co.* (7th Cir. Case No. 77-1314); *Smith v. Schlitz Brewing Co.*, (3rd Cir. Case No. 77-1745); and *Kentroti v. Frontier Airlines, Inc.*, (10th Cir. Case No. 76-1750). The lower court decision in *Kentroti* is unreported, and was issued by Matsch, D.J., in Case No. 75-M-468 in Colorado U.S. District Court in June of 1976.

highly unlikely that this Court would have another case before it raising these issues which could be decided this Term.

Finally, because of the closeness of the decision by this Court in this case, the Court may well consider it to be advisable to obtain the views of the United States on these issues. Counsel for Shell has communicated with the Department of Labor regarding rehearing, and is authorized to state that she has been advised that the Department of Labor retains an active interest in the resolution of these issues. Counsel for Shell was further authorized to state that it is the present intention of the Department of Labor, if rehearing is granted, to renew its application for leave to file a brief as *amicus curiae* and for leave to appear at oral argument.[10]

As a result, this Court should grant the request for rehearing, and set this case down for reargument before the full Court.

[10]The Court previously denied the Department leave to file its brief as *amicus curiae*, apparently because its late filing would have interfered with schedules for oral argument. However, such considerations would not apply to rehearing, inasmuch as such brief is now prepared and is apparently ready to be filed.

Conclusion

For the foregoing reasons, the Petition for Rehearing should be granted.

Respectfully submitted,

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Certificate of Counsel

In accordance with Rule 58(1) of the Supreme Court Rules, counsel for Petitioner hereby certifies that this Petition for Rehearing is presented to the Court in good faith and not for the purpose of delay.

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